

LEGISLATIVE UPDATE

COVERING KY CRIMINAL JUSTICE LEGISLATIVE ISSUES

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DEPARTMENT OF PUBLIC ADVOCACY

Defender Caseloads Rise Dramatically 484 Cases Per Lawyer

Kentucky's caseload crisis in its system of indigent defense continued to worsen last year. Defender caseloads, which were already too high, took another dramatic jump in Fiscal Year 2003. In FY02, the Department of Public Advocacy handled 108,078 at a cost-per-case of \$252. In a recent report entitled *Defender Caseload Report Fiscal Year 2002-2003* (October 2003), it was shown that the Department's caseload had risen in FY03 to 117,132, at a cost-per case of \$238. This represents an 8.4% increase in overall caseload. It also demonstrates a decline of 7.8% in the funding for each defender case.

This comes at a time when defender caseloads were already much too high. It is estimated that in FY02, when caseloads were at 434, they were 40% higher than commonly accepted national standards. Today, they are even higher.

In real life terms, caseloads of this nature threaten Kentucky's public defender and criminal justice systems. It means that lawyers are handling a mixed caseload of juvenile, misdemeanor, and felony cases, including capital cases, at a rate of almost 2 cases per day. It means that lawyers have little time for preparation, for investigation, for motion practice, for client contact, for sentencing work, and certainly for trial preparation. It

means that the reliability of verdicts is being threatened. It means that innocent people are being incarcerated because their attorneys do not have enough time to devote to their cases.

Unless addressed, it means that the vision of *Gideon v. Wainwright*, 372 U.S. 335 (1963) of equality of justice before a court of law irrespective of economic resources remains unachieved.

Reasonable Caseloads are Ethically Required

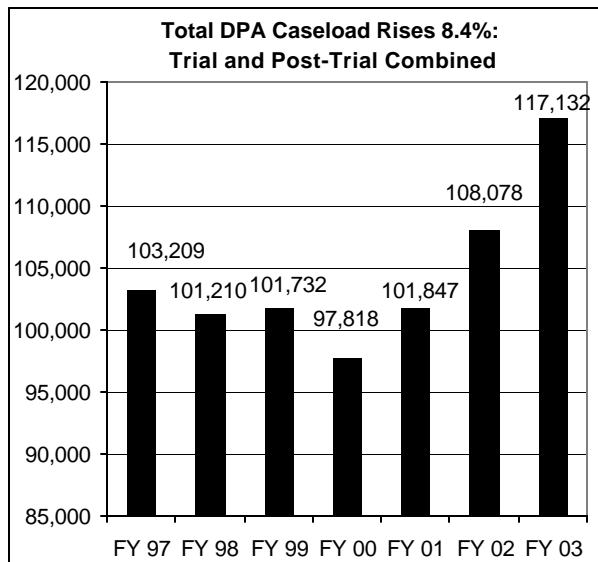
The importance of reasonable caseloads cannot be overstated. Our state relies upon Kentucky public defenders to represent over 117,000 Kentuckians each year. Kentucky relies upon defenders to investigate cases, to locate and raise legal issues, to communicate with defendants, to challenge proof, and to make significant decisions regarding whether to plead guilty or go to trial. Thousands of Kentuckians are sent to jail and prison each year based upon the work of public defenders. The futures of many children hinge upon the skill brought to court by juvenile defenders. Many parts of the criminal justice system, from courts to pretrial release officers to prosecutors to probation and parole offices to juvenile workers rely upon defenders to do their jobs well so that they can also perform their own function.

The National Advisory Commission on Criminal Justice Standards and Goals (NAC) created standards in the 1970's that have become commonly accepted over the years. These

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Ernie Lewis, Public Advocate



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Standards recommend no more than 150 felonies, or 200 juvenile cases, or 400 misdemeanors, or 25 appeals opened by a public defender in a single year.

The *Blue Ribbon Group on Improving Indigent Defense for the 21st Century* found that DPA's caseloads were much too high. The *Blue Ribbon Group* recommended that DPA lower caseloads to 450 for urban defenders and 350 for rural defenders. Rural offices constitute the majority of Kentucky's public defender system.

The *ABA Standards for Criminal Justice: Providing Defense Services*, 3rd Ed. (1992), Standard 5-5.3 states that "[n]either defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases."

The National Legal Aid and Defender Association passed "The 10 Principles of a Public Defense Delivery System to aid policy-makers in their decisions. This in turn was adopted by the ABA's House of Delegates in February 2002. Principle #5 reads: "Defense counsel's workload is controlled to permit the rendering of quality representation." Principle #8 reads: "There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system."

The American Council of Chief Defenders Ethics Opinion 03-01 Calls for Excessive Caseloads to be Declined

The American Council of Chief Defenders, an organization within the National Legal Aid and Defender Association consisting of many of the chief defenders from the nation's largest urban and statewide defender offices, has issued a significant ethics opinion on caseloads. The summary reads in part: "A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case, encompassing the elements of such representation prescribed in national performance standards including the NLADA Performance Guidelines for Criminal Defense Representation and the ABA Defense Function Standards. When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases."

The Opinion is based upon two separate ethical considerations. "The duty to decline excess cases is based both on the prohibition against accepting cases which cannot be handled 'competently, promptly and to completion' (Model Rule 1.16(a)(1) and accompanying commentary), and the conflict-of-interest based requirement that a lawyer is prohibited from representing a client 'if the representation of that client

may be materially limited by the lawyer's responsibility to another client.' (See *Keeping Defender Workloads Manageable*, U.S. Department of Justice, Bureau of Justice Assistance monograph, NCJ 185632, January 2001, at 4-6)."

The Opinion cites Bar Opinions from several states in support of the notion that declining excessive caseloads is required. "[T]he staff lawyer should, except in extreme or urgent cases, decline new legal matters and should continue representation in pending matters only to the extent that the duty of competent, non-neglectful representation can be fulfilled." Wisconsin Formal Opinion E-84.11, reaffirmed in Wisconsin Formal Opinion E-91-3. "There can be no question that taking on more work than an attorney can handle adequately is a violation of a lawyer's ethical obligations...No one seriously questions that a lawyer's staggering caseloads can result in a breach of the lawyer's duty of competence." Arizona Opinion 90-10.

How does the chief defender determine when caseloads have become excessive? The Opinion calls on the chief defender to look primarily to the National Advisory Commission standards referenced above. "Courts have relied on numerical national caseload standards in determining the competence of the lawyer's performance for all of his or her clients. See, e.g., *State v. Smith*, 681 P.2d 1374 (Ariz. 1984)."

The Opinion also makes it clear that its opinion should not be used to hide mismanagement. "Chief public defenders also have various duties to effectively manage the agency's staff and resources to ensure the most cost-effective and least wasteful use of public funding."

Finally, the Opinion reflects on the potential liability that exists when excessive caseloads are maintained. "[B]oth the chief public defender and the jurisdiction may have civil liability for money damages as a result of the violation of a client's constitutional right to counsel caused directly by underfunding of the public defense agency." (citing *Miranda v. Clark County*, 319 F.3d 465 (9th Cir. 2003).

Defender Trial Caseloads went up 8.8% in One Year

In FY03, DPA handled 115,178 cases at the trial level. This was up from 105,855 cases in FY02. In FY01, there were 98,520 cases handled by DPA at the trial level.

This represents an 8.8% increase from FY02 to FY03. This occurred at a time that DPA's budget was reduced, and positions constricted. As a result, DPA's caseload per attorney increased.

In FY 03, each DPA trial lawyer opened an average of 484 cases. This was up from 435 in FY02, and up even more from the 420 cases in FY01. This is most disheartening. The 2000 General Assembly was presented with a budget request from Governor Patton that included \$4 million in FY01 and \$6 million in FY02. That request included 10 caseload reduction lawyers, down from the 35 the *Blue Ribbon Group* had indicated were needed. However, because of the budget reduc-

tions in both FY01 and FY02, DPA was only allowed to fill 5 of the caseload reduction lawyers. More significantly, in the FY03 budget, 26 positions were lost. As a direct result of the rising caseloads, declining budgets, and constricting positions, each DPA trial lawyer's caseload is increasing significantly.

The Number of Offices on the "Critical List" has Expanded

Another way to evaluate this problem is by examining the caseloads in each of DPA's trial offices. DPA has created a "critical list" consisting of those offices where caseloads are at or over 500 new cases per lawyer per year.

At the close of FY03, there were 15 offices on the "critical list." They consist of:

- Bell County: 527 cases
- Columbia: 511 cases
- Covington: 492 cases
- Danville: 498 cases
- Elizabethtown: 636 cases
- Frankfort: 616 cases
- Hazard 576 cases
- Henderson: 592 cases
- Hopkinsville: 576 cases
- LaGrange: 567 cases
- London: 534 cases
- Louisville: 507 cases
- Madisonville: 509 cases
- Morehead: 507 cases
- Paducah: 523 cases

Being on the "critical list" is not a coveted prize. It means that caseloads are unreasonably high. At full staffing, these offices cannot be expected to perform all of the functions required of them. However, when turnover occurs in these offices, or when a family court is added, or when a capital case occurs, there is little these offices can do to meet the needs of the court system or their clients. The need for caseload relief in these "critical list" offices is acute.

A Higher Percentage of the Cases are in Circuit Court

The FY03 Caseload Report reveals another trend. A higher percentage of cases are occurring in circuit rather than in juvenile court. In FY03, 23% of the public defender caseload at the trial level was in circuit court. In FY97, only 16% of the caseload was in circuit court. By FY00, this had grown to 20%. There is an unmistakable trend toward more and more of the public defender caseload occurring in circuit court.

The reason this trend is significant is that cases in circuit court take a great deal more time than they do in district court. Many district court cases can be handled with one or two court appearances. Cases in circuit court, on the other

hand, involve more investigation, review of grand jury tapes and discovery, motion practice, sentencing practice, and on occasion the preparation and conducting of a jury trial, including capital trials.

DPA handles over 90% of the caseload in circuit court. DPA is funded at \$29.8 million for its entire operation for FY03, while prosecutors are funded at above \$70 million. As stated by the *Blue Ribbon Group* report in Finding #7, "All components of the criminal justice should be adequately funded, particularly public defense. Overall the Department of Public Advocacy is under-funded."

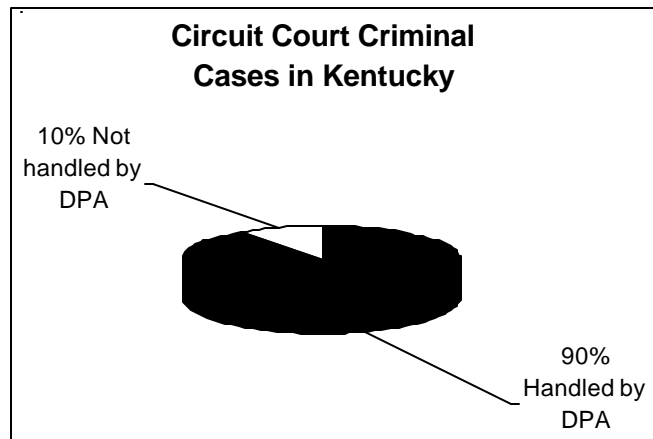
Funding Per Case Drops

One measure of the health of an indigent defense system is cost or funding devoted to each case. In June of 1999, the *Blue Ribbon Group Final Report* stated in finding #4 that "The Department of Public Advocacy ranks at, or near, the bottom of public defender agencies nationwide in indigent defense cost-per capita and cost per case."

Since the time of the *Blue Ribbon Group*, funding provided for each case has been increasing. In FY1997, Kentucky funded each public defender case at \$161. In FY98, this was brought up to \$187. By FY00, this had increased to \$216. Funding per case reached \$252 in FY02. This trend upward stopped in FY03. Funding per case declined in FY03 back down to \$238. At the trial level, the figure is even lower, at \$198 per case. This figure includes cases from DUI to capital murder.

Juvenile Caseloads Remain are too High

In September of 2002, in "Advancing Justice: An Assessment of Access to counsel and Quality of Representation in Delinquency Proceedings," by the ABA Juvenile Justice Center National Juvenile Defender Center and the Children's Law Center, Inc., it was stated that some defender caseloads in Kentucky were "far in excess of IJA/ABA Standards and the NLADA Standards...Effective representation is adversely effected in some parts of the state due to crushing caseloads."



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The juvenile caseload for DPA declined only slightly in FY03. 16,501 cases were opened, representing 14.33% of the Trial Division caseload. This was down from 16,935 cases in FY02, which was 16% of the overall trial caseload. This demonstrates a continuing trend since FY98, when 18,772 juvenile cases were opened representing 20.13% of the overall division caseload.

There is a Connection Between Poverty and High Caseloads

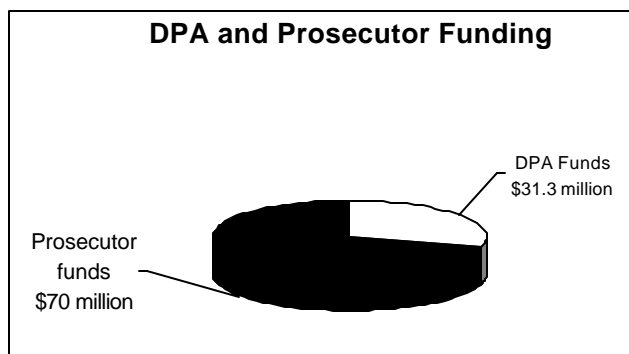
It should come as no surprise that this report indicates a strong connection between the poverty rates in a particular area, and the caseload. Overall, DPA handled 28 cases per 1000 population throughout Kentucky. In the Stanton Office area, where the poverty rate is 25.5%, there were 41 cases per 1000 population. Likewise, in Hazard, where there is a poverty rate of 23.9%, there were 65 cases per 1000. This declined in the Danville Office area, where the poverty rate is 13%, to 21 cases per 1000.

This finding is not consistent across the board, however. In the London Office area, where there is a poverty rate of 23.8%, there were only 25 cases per 1000. Likewise, in the Louisville Office, there were 37 cases per 1000 while the poverty rate is only 11.5%.

The unemployment rate offers additional evidence. In the Bluegrass Region, where there were 26.9 cases per 1000, the unemployment rate is low at 5.6%. In the Eastern Region, with 31.6 cases per 1000, the unemployment rate is 7.3%. The Western Region has an unemployment rate of 6.5%, with 34 cases per 1000. The anomaly remains in Louisville with its unemployment rate of 5.6% and 37 cases per 1000.

This Rising Caseload Occurred While the Violent Crime Rate Nationwide was Declining

This increase in caseload needs to be understood as well in light of national trends. The most recent Bureau of Justice Statistics report indicated that "[o]verall violent victimization and property crime rates in 2002 are the lowest recorded since the inception of the NCVS in 1973....The rate of violent crime dropped 21% from the period 1999-2000 to the period 2001-02."



The reason for this is unclear. It may be that the increase in the number of full-time public defender offices across the Commonwealth has increased the caseload. Anecdotal evidence would support this. It has been the Department's experience that when an office opens in an area, the previously reported caseload often doubles and even triples within a short period of time. Whether this reflects previously eligible but unrepresented indigent defendants, whether it represents better case counting, whether it represents judicial decision-making patterns, or a combination is unclear.

The Department Needs Significantly Higher Funding to Address these Caseloads

The Department of Public Advocacy plays a significant role in Kentucky's criminal justice system. Over 117,000 clients each year are served by the Department's lawyers, 23% of which involve circuit court cases where someone may be sent to the penitentiary. The Department's capacity to serve this clientele has been stretched by budget reductions and by heavy caseloads. An 8.4% increase in FY03 now threatens the Department's ability to continue to provide this service to all eligible clients.

The Department is seeking a significant increase in its budget in the 2004 General Assembly in order to meet its important mission. The Department's budget request will focus on the reduction of its staff lawyers' caseloads at the trial level. The Department is seeking to lower overall caseloads to 450 per lawyer in FY05 and 400 per lawyer in FY06. Without a significant reduction in caseload, the Department will have to employ other alternatives to meet this caseload crisis.

This is the 40th Anniversary of *Gideon v. Wainwright*. This will be the year in which we determine whether the promise of *Gideon* will be met, or whether it will be washed away in a tide of heavy caseloads. ■

Ernie Lewis
Public Advocate

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<http://dpa.ky.gov/library/legupd/default.html>

REVENUE IS A SIGNIFICANT PART OF DPA'S FUNDING PICTURE

Funding indigent defense is a responsibility of state government. *Gideon v. Wainwright*, 372 U.S. 335 (1963). While many states have placed on local governments some level of funding responsibility, the ultimate responsibility remains on the state. In Kentucky, three counties supply some level of funding for their local public defender systems: Louisville Metro, Fayette, and Boyd. With those three exceptions, the Commonwealth of Kentucky pays for its public defender system.

Kentucky has a statewide public defender system. KRS 31.010. This system is primarily funded by the state General Fund. Out of a \$29.8 million budget funded by the 2003 General Assembly, \$25.3 million is allocated from the General Fund while \$1.3 million comes to the Protection and Advocacy Division from the federal government. The remaining \$3 million of DPA's budget was authorized by the 2003 General Assembly to come from revenue. In October of 2003, an Appropriations Increase allowed the Department to spend an additional \$1.5 million in revenue, raising the Department's authorization level to \$4.5 million. Thus, today, \$4.5 million out of a \$31.3 million budget comes from revenue sources. This is over 14% of Kentucky's funding commitment for indigent defense.

Three Sources of Revenue

DPA receives funds from three statutory sources. DPA's oldest source of revenue is the "partial fee." KRS 31.211 (1) states that the trial court may "determine whether a person who has requested a public defender is able to pay a partial fee for legal representation." After three months into FY03, \$352,986 has been collected in partial fees from indigent criminal defendants. This fee most resembles a "user fee" in that all persons paying a partial fee are recipients of public defender services and have been determined to be at least partially indigent.

A second source of revenue is the DUI Service Fee. KRS 189A.050(1) imposes a \$250 service fee on all persons convicted of DUI. DPA receives 25% of this fee, or \$62.50. This fee has generated \$364,693 for DPA thus far this fiscal year.

The final source of revenue for DPA is a portion of court costs. The 2002 General Assembly abolished the public advocacy administrative fee, which had proved to be a largely unsuccessful method for generating income for indigent defense. Today, KRS 23A.205, 24A.175, and 42.320 create a \$100 court cost in criminal cases, 3.5% of which is allocated to DPA, capped at \$1,750,000. Thus far in FY04, \$438,772 has been generated in court costs for indigent defense.

Each statute creating a revenue source explicitly states that the revenue is to be placed into an agency account that does not lapse from year to year.

Together, these three sources of revenue provide a significant boost to funding for indigent defense. In FY03, \$4,341,830 was

collected in revenue. Thus far in FY04, \$1,156,453 has been collected. This is up 15% from the same time in FY03.

The Blue Ribbon Group

In 1999, the *Blue Ribbon Group on Improving Indigent Defense for the 21st Century* issued its influential final report. This report looked, among other things, at the collection of revenue as part of DPA's funding. Keep in mind that the report was issued prior to the replacement of the public advocacy administrative fee with a proportional share of court costs. Finding #3 of the *Blue Ribbon Group* was that the "Department of Public Advocacy is effective in indigent defense cost recovery compared to other states." The report noted further that "[a]t almost 15% of the total DPA budget, Kentucky's public defender program is more dependent on alternative revenue than any other state public defender program."

Revenue Permits Funding to Rise with Caseload Increases

DPA's caseload increased over 8% in FY03. At the same time, DPA's revenue also increased. This enabled DPA to request and receive an Appropriations Increase to allow spending on indigent defense to rise by \$1.5 million this fiscal year.

An important justification for including some level of revenue as part of DPA's funding picture is that revenue collection may rise with caseload. When DPA's DUI caseload increases, its share of the DUI Service fee should also increase. When more criminal cases occur in the system as a whole, DPA's share of court costs should also go up. It should be noted, however, that DPA has been capped in KRS 42.320 at \$1.75 million. Thus, unless changed at some point, DPA will not be able to meet rising caseloads by utilizing additional funding from the court cost fund.

DPA is funded two years in advance, as is all of state government. It is difficult to predict the caseload level two years in advance. Revenue allows for some of the increase in caseload to result in some level of additional funding that can then be applied to the increased need for representation.

Appropriate Revenue results in a level of Accountability

DPA will always need the lion's share of its funding to come from the General Fund. However, revenue plays an important role in funding Kentucky's public defender system. The partial fee allows for defendants receiving a service to be invested in their representation. It places a certain amount of responsibility on those individuals. The DUI Service Fee and the Court Cost fund also create a system whereby persons involved in the criminal justice system help fund this constitutional responsibility. ■

Ernie Lewis, Public Advocate

APPROPRIATIONS INCREASE GRANTED: HUGE CASELOADS PARTIALLY ADDRESSED

In October 2003, the General Assembly has authorized the Department of Public Advocacy to spend \$1.5 million in accumulated revenue this fiscal year. This Appropriations Increase will be devoted to solving the Department's most acute problems.

DPA's budget for FY04 is \$29.8 million. Included in that figure is \$3 million from revenue. DPA receives revenue from the DUI Service Fee, Court Costs, and the Partial Fee. All of this revenue is placed in a special account that does not lapse from year to year. In FY03, DPA collected over \$4.3 million in revenue. Thus, some revenue accumulated during the past year.

At the same time that this revenue was accumulating, DPA's caseload was increasing at over 8%. Yet, DPA had no authorization to spend its available revenue without explicit approval from the General Assembly. After the completion of the Appropriations Increase process in October of 2003, that explicit approval has now occurred. As a result, DPA will be allowed to spend an additional \$1.5 million from available revenue to address its most acute problems.

Caseload Reduction

The first area that will receive attention is in the area of caseload reduction. DPA is in the middle of a caseload crisis. Caseload increased over 8% in FY03. Average caseloads per attorney were far in excess of national standards at 484 per lawyer per year in FY03. 13 offices featured caseloads in excess of 500 new cases per lawyer per year.

As a result of the Appropriations Increase, DPA will hire 13 lawyers and place them in the highest caseload offices. Because there exists a hiring freeze at present in state government, and because DPA has had its number of positions lowered, DPA will utilize contracts in order to put these new lawyers to work.

In addition, DPA will hire a number of secretaries in offices where the new lawyers are placed. DPA has attempted to maintain a ratio of 3 lawyers to 1 secretary in the field offices. There are a number of offices where this ratio is now attained. DPA will use this Appropriations Increase to move toward a 3 to 1 ratio.

This Appropriations Increase marks a big step toward mitigating the caseload crisis but it does not solve caseload problems. DPA will seek to obtain the positions funded by the increase in the 2004 General Assembly. In addition, DPA's

budget request will seek to lower its average caseloads to 450 cases per lawyer in FY05, and 400 cases per lawyer in FY06.

Louisville/Jefferson County Public Defender's Office

The Louisville/Jefferson County Public Defender's Office has seen its caseload go up in the past two years. In FY00, the Louisville Office had 471 cases per lawyer. This declined to 405 in FY01, and went back up to 421 in FY02. However, the Louisville/Jefferson County Public Defender's Office has had its budget received from the state reduced during the past several years when DPA's overall budget was reduced. As a result, Louisville/Jefferson County's attorney contingent dropped from 55 to 51 lawyers. At the same time, their caseload rose from 23,763 in FY02 to 25,981 in FY03. Their cases per lawyer increased from 421 in FY02 to 507 in FY03. This figure is far in excess of national standards.

The Appropriations Increase will allow \$100,000 to be granted to the Louisville/Jefferson County Public Defender's Office. This would allow the hiring of two additional caseload reduction attorneys.

Campbell County

The Public Advocacy Commission established the completion of the full-time system at the trial level as one of its primary goals in 1990. In 1996, I affirmed that particular goal as the primary goal of my administration of the DPA during my tenure. At the time, 47 counties were covered by a full-time office, while 73 counties delivered services by the contract method.

Since 1996, significant progress has been made in completing the full-time system. As of November 1, 2003, 117 counties in Kentucky are now covered by a full-time office. The opening of offices in Boone and Harrison Counties in October increased this number from 112 to 117. Only three counties remain: Campbell, Barren and Metcalfe Counties.

The Appropriations Increase will allow the Department to move Campbell County from the part-time category into the full-time category. The Covington Office will be expanded beyond its present coverage of Kenton County to include Campbell County. There is available office space in the present building housing the Covington Office. 4 attorneys and 1 secretary will be added to the Covington Office. Last year, Campbell County reported 1138 cases, 25% of which were in circuit court.

Appeals

The Department is responsible for all of the appeals generated from all 120 counties. At present, the Lexington Office handles its own appeals to the Court of Appeals. The Louisville/Jefferson County Offices handles all of its own appeals. The Appeals Branch of the Department handles all of the remaining appeals. In FY03, the Department assigned 234 Court of Appeals cases and 85 Supreme Court cases. In order to handle these appeals more efficiently, the Department will hire 2 appellate lawyers as part of the Appropriations Increase.

Conclusion

This Appropriations Increase has occurred just in time. DPA's exploding caseload is reaching crisis proportions. This increase will allow these caseloads to be reduced pending presentation of the budget before the 2004 General Assembly. ■

Ernie Lewis
Public Advocate



BOONE & HARRISON DEFENDER OFFICES OPEN: THREE COUNTIES TO GO!

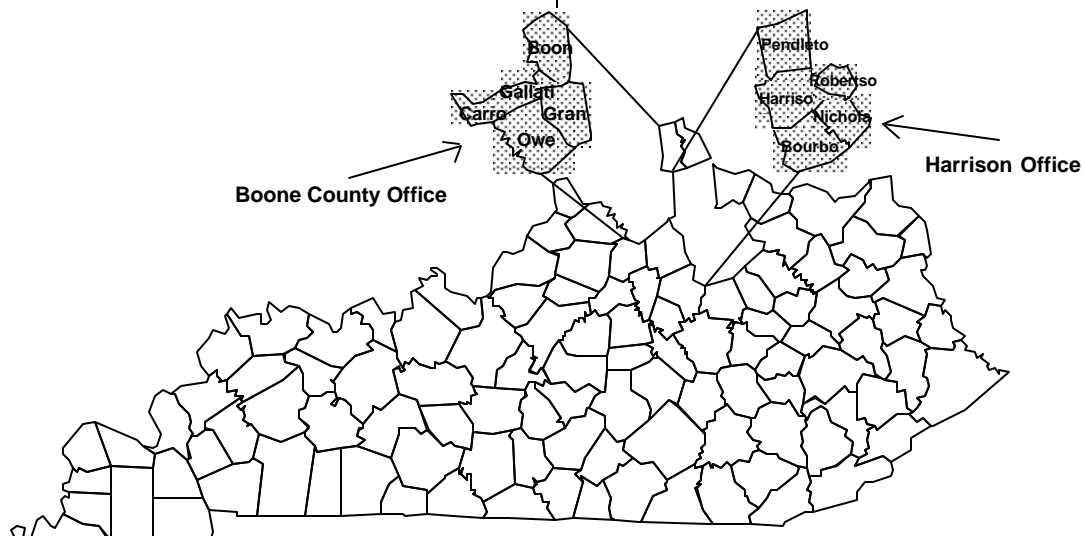
New full-time public defender offices which opened in October 2003 in **Boone and Harrison Counties** bring Kentucky closer to realizing its goal of serving all 120 counties by a full-time public defender system.

With the opening of offices, covering Boone, Gallatin, Carroll, Owen, Grant, Harrison, Nicholas, Robertson, Pendleton and Bourbon Counties, 117 counties are now covered by a full-time public defender office. Only three counties remain outside the full-time system: Campbell, Barren and Metcalfe Counties. Campbell County will be covered out of the Covington Office later in FY04 and an office in Glasgow to cover Barren and Metcalfe Counties will be part of the FY05-06 budget request.

In **Boone County**, the Department of Public Advocacy was able to lease space from the Cabinet for Families and Children at 8311 U.S. 42, Victory Centre, Suite 201 in Florence,

Kentucky. DPA started in temporary quarters across the hall from its permanent locations and moved into permanent space on November 15, 2003. The office is taking new cases and working on transitioning with the existing contract defenders. Boone County's staff consists of Office Director John Delaney (formerly of the DPA Covington Office), Rhonda Lause (formerly of the DPA Hopkinsville Office), Ed DeWerff, Matthew Ryan, Investigator Paul Flinker, and Secretary Pat Bal.

The **Harrison Office** is housed in temporary quarters at the Old Cynthiana Courthouse, 2nd Floor, Cynthiana, Kentucky 41031, pending permanent facility approval. Office Director Damon Preston (formerly of the DPA Paducah Office), Jason Gilbert, Melissa Bellevue (formerly of the DPA Columbia Office) and new lawyer Jesse Robbins, along with Secretary Sarah Carl are taking new cases as well and working on transitioning w/ith local contractors. ■



AN OFFICE IN GLASGOW WILL COMPLETE THE FULL-TIME SYSTEM

The full-time system in Kentucky is within reach. It can be accomplished with the opening of one more office in Glasgow. This office would cover Barren and Metcalfe Counties, the last two counties without a full-time office in the state. It would also take Monroe County from the Columbia Office.

25 Years

The full-time system in Kentucky has taken 25 years to complete. Initially, KRS Chapter 31 contemplated a public defender system that was county controlled, with counties choosing their system and providing funding for that system, to be supplemented by the state. The flaw in the design was the reluctance of counties to fund what was basically a function assigned the state by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Department of Public Advocacy is charged by KRS Chapter 31 with administering a statewide system, including the approval of local plans for delivering services. Initially, the Department oversaw an assigned counsel system whereby individual attorneys were paid for individual cases after submitting a voucher for payment. When this delivery method proved too costly, the General Assembly abolished it. In its place, the General Assembly allowed for two delivery systems: a contract with private attorneys, or a full-time office.

Full-time offices were in place at the time KRS Chapter 31 was written in Louisville and Boyd County. Fayette County Legal Aid became a full-time office later in the 1970s. Offices also began to spring up during the late 1970s throughout Eastern Kentucky as a result of a grant from the Law Enforcement Administration.

In the early 1990s, the Public Advocacy Commission committed to a full-time system throughout the state as one of its primary goals. Yet, by 1996, when I became Public Advocate, only 47 counties were covered by a full-time office. 73 counties continued to have private lawyers providing services while on contract with DPA. Counties that contributed to their public defender system were few and far between.

I made completing the full-time system my primary goal as Public Advocate. I believed that like the Commonwealth's Attorneys Offices, Kentucky would be better served by a more cost-efficient and higher quality system if all counties were covered by a nearby full-time office staffed with criminal justice professionals. The Governor and the General Assembly have worked as partners in completing the system, funding offices in Owensboro, Bowling Green,

Paintsville, Maysville, and Columbia in 1998, and Bullitt County and Murray in 2000. Boone County and Cynthiana were funded by the 2003 General Assembly. Today, 117 counties are covered by one of 29 full-time offices. Campbell County will be added to the Covington Office later this fiscal year, marking the 118th county as part of this system.

One More to Go

Only Barren and Metcalfe Counties remain. One of the most important parts of the Department's 2004 budget request is the funding of an office in Glasgow. At that point, Kentucky will proudly become a state with a completed full-time system at the trial level.

That will not be the end of improving our system of indigent delivery. At that point, we will have a structure of 30 offices divided into 6 regions (the Louisville/Jefferson Office counting as one region for purposes of this discussion). Every county in the state will have a directing attorney whose responsibility it will be to ensure that indigent defendants are being well represented. Regional managers will likewise be required to watch over the quality of services being delivered in their region. Accountability will be built into the system. Every attorney in the system will be required to be educated on a regular basis on juvenile, district court, circuit court, and capital practice. Each attorney will have an opportunity to be educated annually on the latest in litigation skills. Each new attorney will be mentored and coached by a senior lawyer. However, there are other needs that will have to be addressed, including:

- ◆ Excessive caseloads. Until Kentucky public defenders have reasonable caseloads, the full-time system will not reach its full potential.
- ◆ Funding for conflict attorneys. Private lawyers will always play a significant role in Kentucky's public defender system. It is estimated that 10% of the cases involve a conflict of interest. Kentucky does not now fund that 10% at a rate that will allow for reasonable compensation to private lawyers. This will have to be addressed.
- ◆ Support staff for the field offices. At present, offices are staffed at 3 attorneys to 1 secretary and 1 investigator. Only Louisville and Lexington have multiple investigators. There are only 2 social workers outside of the Louisville/Jefferson Office. Each office needs a social worker/mitigation specialist who can work on sentencing alternatives, juvenile cases, and mitigation development in capital cases.

It is hoped that by the end of the 2004 General Assembly, the completion of the full-time system will be within reach.■

Ernie Lewis, Public Advocate

ABA REVIEWS KENTUCKY JUVENILE REPRESENTATION

The American Bar Association, the Juvenile Justice Center, the National Juvenile Defender Center, and the Children's Law Center have issued a significant report on the quality of representation being provided for Kentucky's indigent children by the Department of Public Advocacy. The most significant findings are that:

- ◆ Kentucky's public defenders' caseloads are too high.
- ◆ Most children are now being appointed a public defender.
- ◆ Kentucky's full-time system has improved the quality of representation being provided Kentucky's children.

The Report is a Follow-up to the 1996 Report

In 1996, the Children's Law Center issued "Beyond *In re Gault*: The Status of Juvenile Defense in Kentucky." This scathing report decried the quality of representation being provided Kentucky's children by the Department of Public Advocacy. Included in the findings of that report were the following:

- ◆ Caseloads among both part-time contract attorneys and full-time attorneys were far too high.
- ◆ Many juveniles were not represented by counsel at all during detention hearings and other proceedings.
- ◆ There were many other indications of poor quality representation, including insufficient client contact, forced pleas, weak trial preparation and motion practice, and little post-dispositional advocacy.
- ◆ Quality of representation was the poorest among the private attorneys in DPA's 73 contract counties.

DPA's Responded to *In re Gault*

The Department took the criticism to heart. DPA sought additional funding from the 1998 General Assembly in significant part to address the concerns of the *In re Gault* report. The 1998 General Assembly recognized the problem and gave additional funding to the Department that allowed it to do the following:

- ◆ The Department expanded the full-time system. 5 offices were opened in Bowling Green, Owensboro, Paintsville, Columbia, and Maysville. DPA expanded the full-time system from 47 counties in 1996 to 117 today.
- ◆ A juvenile trainer was hired. This trainer became the manager of DPA's Education and Strategic Planning Branch. He has created the *Gault Initiative*, which has as its explicit goal the improvement of the quality of juvenile representation through different mechanisms including Juvenile Summits held regionally with juvenile attorneys throughout the state and the development of a listserve for attorneys.
- ◆ Juvenile specialists identified in many of the field offices.

- ◆ 2 social workers were hired and placed in Hopkinsville and Hazard. They remain the Department's only two social workers.
- ◆ The Juvenile Post-Dispositional Branch became part of DPA's budget and structure. Previously, it had been a grantee from the Department of Juvenile Justice.

Advancing Justice: the 2002 Report

The ABA and Children's Law Center determined at the Department's request to look at the progress made since their 1996 report. They did so during a 2001 study, reported in September of 2002. The study consists of 69 pages and contains raw data, summaries of interviews, and a series of recommendations. It can be found at <http://www.abanet.org/crimjust/juvjus/kentuckyhome.htm>

The findings of the report include:

- ◆ Caseloads for many public defenders are "far in excess of the IJA/ABA Standards and the NLADA Standards."
- ◆ Most juveniles in treatment facilities were represented by counsel. This represents a sea change in Kentucky's system of juvenile justice. However, "large numbers of youth are still waiving counsel without the appropriate procedural safeguards."
- ◆ Counsel usually sees their clients at the first appearance; early access to counsel remains elusive.
- ◆ Motion practice has "improved significantly."
- ◆ "[L]imited dispositional advocacy" is occurring. Disposition hearings "tended to be 'rubber-stamping' recommendations by DOJJ, with little advocacy effort on the part of the attorney..."
- ◆ Post-dispositional work by the Juvenile Post-Disposition Branch "appears to be highly effective in addressing individual client's needs as well as systemic change."
- ◆ "The advances in creating full-time offices appears to have significantly improved representation and the availability of counsel."

The report identified a number of "barriers to effective representation" including:

- ◆ Inconsistencies in how status offenders are represented.
- ◆ "Crushing caseloads, court docketing, and geographic challenges..."
- ◆ Detention is "over-utilized."
- ◆ Confidentiality is "eroding."
- ◆ Treatment is not available for youth with "significant mental health and disability needs."
- ◆ Minority youth are over-represented through the juvenile justice system."

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There are numerous recommendations, including:

- ◆ Caseloads should be reduced where they exceed IJA/ABA Standards.
- ◆ Resources should be made available to local trial offices, including provision of “appropriate training and availability of support staff with special expertise...” There should be an effort made to achieve “equity” between juvenile and adult defense efforts.
- ◆ Work should be done on early access to counsel including police questioning and inquiries before the CDW.
- ◆ Attention should be paid to providing counsel to status offenders.
- ◆ “Strong disposition advocacy...becomes a priority within field offices...”
- ◆ Attention should be paid to “disproportionality of minority youth in the juvenile justice system...” as well as “gender-based issues.”
- ◆ Attention should be paid to “alternatives to criminalization of youth with emotional, behavioral, and/or other mental health needs.”

- ◆ Experienced defenders should be encouraged to remain in juvenile court practice.

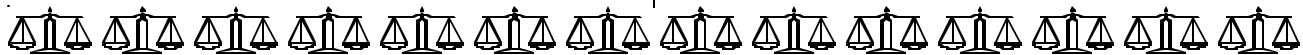
Several “promising practices” were identified across the Commonwealth, including:

- ◆ Jefferson County Juvenile Defense Team and Team Child.
- ◆ DPA’s Juvenile Post-Disposition Branch
- ◆ Use of JAIBG Funds for enhancing representation.
- ◆ The *Gault Initiative* featuring regional training summits and e-mail listserves.

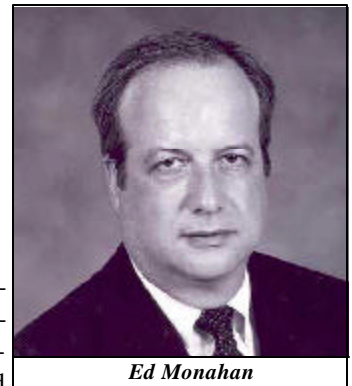
Conclusion

There is also a recommendation for the Kentucky General Assembly in this report. “The Kentucky Legislature should ensure that adequate funding is in place for the Kentucky Department of Public Advocacy to ensure that quality representation is consistently available across Kentucky, including funds for training, non-attorney support and resources, manageable caseloads and adequate compensation.” ■

Ernie Lewis, Public Advocate



LAW SCHOOL LOAN ASSISTANCE NEEDED TO RECRUIT AND RETAIN GOOD LAWYERS TO DO THE PUBLIC’S BUSINESS



Ed Monahan

Law school loan forgiveness remains an unmet need for Kentucky defenders, prosecutors, judicial clerks and civil legal aid attorneys. These public servants in the judicial system have large student loans. The average student law school loan balance indicated in a Fall 2003 Legislative Research Commission (LRC) Survey for Kentucky prosecutors, judicial clerks, public advocates, and legal services attorneys was substantial, \$47,973. The range of balances was up to \$ 161,000. Of those surveyed, 223 had a law school loan balance remaining.

Recruiting and Retaining Quality Legal Public Servants Is Difficult. The combination of low salaries and high student loans has made recruiting entry-level attorneys difficult. Salaries have increased for prosecutors, defenders, judicial clerks and civil legal aid attorneys but student law school loans are an area that remains a significant disincentive for many who want to be a prosecutor, defender, judicial clerk or civil legal aid attorney from taking a position. Retaining experienced attorneys has also been a problem for prosecutors, defenders, judges, and legal aid.

Student Loan Forgiveness for Prosecutors and Defenders Recommended by BRG. In light of these problems, the *Kentucky Blue Ribbon Group on Improving Indigent Defense in the 21st Century* (BRG) made the following Recommendation: “Recommendation No. 5: Loan Forgiveness Programs Should Be Made Available to Prosecutors and Defenders.” The BRG’s

members included the Chief Justice, former Chief Justice, a prosecutor, legislators, the KBA President and Past-President and many prominent professional.

Loan Forgiveness Program will Improve Criminal Justice System. Many circuit judges have complained of the low pay for law clerks, and several clerks, including clerks working for Kentucky’s appellate court judges have a huge law school loan debt load. The Commonwealth Attorney Association and the Prosecutor’s Advisory Council have endorsed a law school loan assistance bill. Prosecutors identify student law school loan assistance as essential to attract and keep top quality young prosecutors. Public Advocate Ernie Lewis is very interested in a loan assistance program because of its affect on the way the people’s business is done in Kentucky courtrooms day in and day out, “Public service is one of the lawyer’s highest callings. We do the public’s business both prosecuting and defending. While no one goes into public service expecting to become wealthy, we must enable young law students to engage in public service without a financial sacrifice. It is essential that we attract high quality lawyers to perform this noble function. Our ability to do that is threatened by the high price of law school accompanied by enormous student loans carried by graduating law students. It is important that Kentucky address this problem soon.”

What the Bill Does. The draft bill establishes a program administered by the Kentucky Higher Education Assistance Authority. It provides reimbursement to full or part-time prosecutors (attorney generals, commonwealth attorneys, county attorneys), public advocates, judicial clerks and legal aid attorneys for payment of student law school loan expenses. It requires a commitment of two-year increments of employment that can be renewed. For full-time attorneys, reimbursement is up to \$6000 per year. For part-time attorneys, reimbursement is up to \$3000 per year. An attorney who voluntarily leaves the employment during the two-year commitment must return all payments received during that two-year period.

Public Policy Reasons for the Act. There are considerable public policy reasons for a Law School Loan Assistance Act:

* **Attracts Better Lawyers.** Assisting new law school graduates with their large law school loan payments will be one tool to recruit a higher quality attorney to important public service.

* **Keeps Better Lawyers.** Law school loan assistance will allow prosecutor, defender, and legal aid offices and judges to retain higher quality attorneys in public service longer. Turnover of experienced attorneys who have been trained at public expense will be reduced. Taxpayer money will be more effectively used, as new attorneys will not have to be trained as frequently.

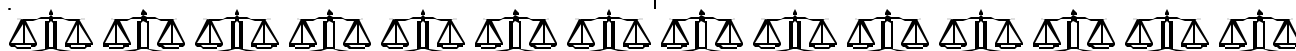
* **Serves Public Better.** Having better lawyers hired and retained will allow the public's important business in the criminal and civil justice system to be done at a higher level of competence and more efficiently, creating more public confidence in the process and the results.

* **Increases Minority Employment.** Student law school loan assistance is likely to make it possible for more minorities to choose and stay with public service.

* **Fosters Public Interest Work.** The American Bar Association has a policy that "encourages law schools, state and local bar associations, and federal and state lawmakers to establish Loan Assistance Repayment, Loan Forgiveness, and Income Sharing Programs for law school graduates accepting low-paying, legal, public interest employment."

Loan forgiveness for prosecutors, defenders, judicial clerks, and civil legal aid attorneys remains an unmet need in Kentucky. The creation of a program to assist public servants doing legal work will attract and retain the best and the brightest in our criminal and civil justice system and provide for justice that is efficient and effective for the people of Kentucky. The public will have its important business done by quality attorneys. ■

Ed Monahan, Deputy Public Advocate



DPA JOINS AOC IN EFFORT TO IMPROVE BAIL ADVOCACY

The Department of Public Advocacy has joined with the Administrative Office of the Courts in a major statewide effort to improve the quality and efficiency of the criminal justice system in the area of bail and pretrial release. This project, ongoing since the spring of 2002, is having a significant impact.

Every year, more than 100,000 Kentuckians are arrested, many for the first and only time in their lives. Our District Judges, who make most of the initial decisions on bail, must make a host of these critical decisions fairly, accurately, and quickly. The District Court will usually first review a case at a very early stage, often in the middle of the night, right after an arrest occurs. The reviewing judge has three very important decisions to make, and they must be made immediately. First, the judge has to decide whether there are enough facts alleged against the citizen under arrest to require him to make a court appearance. Secondly, if the judge decides to require the citizen to appear in Court, the judge has to decide whether to release the accused without posting a cash bond. Finally, if the judge decides to require a cash bond, he or she must decide the amount. In all these decisions, the judge has to uphold the presumption of innocence, consider the safety of the community, and assess the likelihood that the accused citizen will return to court. The judge will also have to decide whether to appoint a public defender to represent the accused. The judge may also wish to have in mind the fact the unnecessary use of pretrial detention can be a significant drain on a county

budget, and may only wish to utilize pretrial detention when strictly necessary.

In making these important decisions, the judge will turn to information collected by a Pretrial Release Officer from the AOC. These dedicated workers provide exemplary service to the citizens, to the courts and to those under arrest. They interview the accused as to his ties to the community, and provide a preliminary assessment of his risk of flight. They pull the citizen's prior record, if any, and they make recommendations to the judge as to the manner of pretrial release. They also can, if the Court requests it, monitor those released on bond to insure their return to court. Pretrial Officers interview the person under arrest so that the judge can make a fair decision whether or not to appoint a Public Defender. This information is recorded in a document called an Affidavit of Indigency. Pretrial Officers therefore play in crucial role in ensuring that the services of the Department are neither overutilized nor underutilized.

If the citizen under arrest has not been able to post the bail originally set by the judge, his lawyer will ask the judge to review bail when the accused appears in court. When a public defender has been appointed, the Court will also review the appointment to make certain that the defendant really qualifies for the services of the Department. The Court will also consider the appointment of counsel for those who have not been finan-

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cially able to hire a private lawyer before their first appearance in Court. In making these important decisions, the Court will often find the remarks of counsel to be of crucial assistance. To assist the Court in making these decisions, public defenders will often refer to the documents collected by the pretrial officer. Because Pretrial Officers are critical in helping to ensure that all those, but only those qualified for our services become clients of the Department, and that our clients obtain a fair bail under the law, it is important that Pretrial Officers and defenders work together in a cooperative way.

To that end, in the spring of 2001, that AOC/DPA Workgroup on Appointments and Pretrial Release was convened. This Workgroup consisted of District Judges, Pretrial Officers, and public defenders from all around Kentucky. In several intense sessions, the Workgroup discussed mutual problems, and brainstormed solutions, all with a view to providing better service to the citizens of Kentucky. The Workgroup made Findings and Recommendations on the Appointment of Public Defenders, and on Pretrial Release. These Findings and Recommendations are posted at: <http://dpa.ky.gov/library/advocate/aug02/default.html>.

The cooperative work continues. The Department is providing a special emphasis on the Findings and Recommendations in its New Attorney Training.

The Department also has obtained a federal grant to hold joint training sessions with Pretrial Officers. District Judges, prosecutors, police, jailers, local service providers, and interested citizens have been made welcome at these sessions as well. Mary Green, chief Pretrial Officer in the Sixth Judicial District attended the session held in Owensboro. As one result of the Owensboro Seminar, Mary Green has been asked to make a

presentation to newly hired police officers in Owensboro, to teach new officers about the law of bail, and on the importance of filing a detailed and accurate Post Arrest Complaint.

In the Spring of 2004, the Department will begin a series of regional meetings between pretrial officers and defenders. The first pilot meeting will be held in the Department's Western Region, and is being coordinated by Ed Crockett, the AOC Head of Pretrial Services and by Tom Glover, the Department's Western Regional Manager.

Starting also in the Spring of 2004, the Department will begin a self assessment to determine ways we can improve our advocacy in the area of bail. A survey instrument is being prepared by Central Regional Manager Rob Sexton, and will be circulated to all our offices. The information thus obtained will be used to plan the Departments ongoing efforts in training and supervision of defenders to ensure excellence in bail advocacy. The Department has also prepared a Pretrial Release Manual based in part on the Findings and Recommendations of the AOC/DPA Workgroup. This manual is available to every defender, and has been particularly useful to our newer attorneys.

Proper application of the law of bail can reduce cost of the criminal justice system and can maximize its efficiency. The setting of fair and reasonable bonds also increases the equity of the system, which is one of its greatest values to the citizens. Studies have even shown that the fairness of the system is one of the most powerful factors in reducing future court contact in those presently charged with a crime. The Department is committed in doing its part, in cooperation with Pretrial Services and other participants in the justice system, to providing excellent service to our clients, on behalf of all citizens, in the area of bail advocacy. ■ **Rob Sexton and Tom Glover**

Legislative Update

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